IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY JAMES GAMBLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 91-C-136-B
	)	
FRED PARKE, et al.	)	
	)	
Defendants.	)	

FILED

OCT 18 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motions for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Fred Parke, Tom Gillert, Fred Morgan and City of Tulsa. Plaintiff shall take nothing of his claim.

Dated, this 18th day of October, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

31

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GLORIA DENISE CURLS,)
)
Plaintiff,)
)
v.) 91-C-240-C
)
HOWARD RAY, et al,)
)
Defendants.)

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed September 16, 1991 in which the Magistrate Judge recommended that the Respondent's Motion to Dismiss be **granted.**

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that Respondent's Motion to Dismiss is **granted.**

Dated this 15th day of October, 1991.

H. Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY JAMES GAMBLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	91-C-136-B ✓
	)	
FRED PARKE, et al,	)	
	)	
Defendants.	)	

ORDER

This order pertains to Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (Docket #2)[1], Plaintiff's Amended Complaint (Docket #7), Plaintiff's Second Amended Complaint (Docket #22), Defendant Parke's Motion to Dismiss and Alternative Motion for Summary Judgment (Docket #11), the Motion to Dismiss and Alternative Motion for Summary Judgment Submitted on Behalf of Defendant City of Tulsa (Docket #14), Defendants Gillert's and Morgan's Motion for Summary Judgment (Docket #27), Plaintiff's Objections to Motion for Summary Judgement[sic]/Dismissal (Docket #16), Plaintiff's Objections to Motion for Summary Judgement [sic] Submitted by Defendant City of Tulsa (Docket #18), and Plaintiff's Motion Opposing Summary Judgement [sic] (Docket #29).

Plaintiff was arrested on April 16, 1990 on a charge of accessory to first degree murder (Docket #2, p. 2). The alleged murder is believed to have taken place on or about July 23, 1982, according to the affidavit which led to the warrant for Plaintiff's arrest. That affidavit was prepared by Detective Corporal Fred Parke ("Parke") of the Tulsa Police Department on March 22, 1990 (Parke's Exhibit C, Docket #13). Parke's affidavit was

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

prepared at the direction of Defendant Tom Gillert ("Gillert"), Assistant District Attorney for Tulsa County. Parke had sought Gillert's guidance because of the possibility that the charge was barred by a statute of limitations. Gillert and another Assistant District Attorney, Defendant Fred Morgan ("Morgan"), determined that Oklahoma law is not clearly settled as to the statute of limitations for accessory to first degree murder. Based on that determination, and his opinion that the statute of limitations did not apply, Gillert directed Parke to pursue the warrant for Plaintiff's arrest (Affidavit of Gillert, Docket #13).

The charge against Plaintiff was dismissed by the preliminary hearing judge upon the judge's conclusion that it was time-barred. Plaintiff has brought this action against Parke for malicious prosecution, false imprisonment, and cruel and unusual punishment (Docket #2); against the City of Tulsa for negligence in its training, supervision, discipline, and control of Parke (Docket #7); and against Gillert and Morgan for false arrest/imprisonment, malicious prosecution, negligence, and denial of equal protection (Docket #22). Plaintiff claims that Parke, Gillert, and Morgan caused him to be arrested with the full knowledge that the charge was barred by a statute of limitations. Parke and City of Tulsa have moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted) or, in the alternative, for summary judgement pursuant to Fed.R.Civ.P. 56. Gillert and Morgan have moved for summary judgment only.

Recovery under § 1983 requires that a plaintiff establish two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *Gunkel v. City of Emporia, Kans.*, 835

F.2d 1302, 1303 (10th Cir. 1987). Defendants Parke, Gillert, and Morgan are state employees, so conduct in their official capacity satisfies the first element. However, prosecutors and police officers are afforded some immunity from § 1983 suits because of their particular job responsibilities, and whether the City of Tulsa is a "person" depends upon the context of the case.

DEFENDANT CITY OF TULSA

Because Plaintiff's action against the City of Tulsa can be resolved upon examination of the pleadings alone, the City's motion to dismiss will be considered. The rule for reviewing the sufficiency of any complaint is that the "'complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). A court may dismiss an action for failure to state a cause of action "only if it is clear that no relief could be granted under any set of facts which could be proved". *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Plaintiff's action against the City of Tulsa cannot be maintained based on these allegations, nor can he prove any set of facts under these allegations which would allow maintenance of this action. "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom ... inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dept. of Soc. Serv. of N.Y.*, 436 U.S. 658, 694 (1978). Section 1983 liability cannot be based on the theory of *respondeat superior*. *Id.* Plaintiff

has alleged only that the city of Tulsa is liable because of Defendant Parke's actions, but a single incident of alleged misconduct is not sufficient to infer that a custom or policy exists to train employees improperly. *See City of Okla. City v. Tuttle,* 471 U.S. 808 (1985). Plaintiff has done nothing other than state that the City of Tulsa inadequately trained and supervised Defendant Parke and points to no incidents other than Defendant Parke's alleged misconduct. This does not constitute an allegation of a custom or policy leading to Plaintiff's alleged constitutional deprivations.[2]

DEFENDANTS GILLERT AND MORGAN

Defendants Gillert and Morgan have moved for summary judgment upon the basis of absolute prosecutorial immunity or, in the alternative, qualified immunity. "[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp v. Catrett,* 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. *Id.* at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby,*

[2] The City of Tulsa's brief in support of its motion for summary judgment does not argue this position. Nonetheless, the City's motion for dismissal allows the court to reach the issue.

Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by *Celotex* and *Anderson*. *Setliff v. Memorial Hosp. of Sheridan County*, 850 F.2d 1384 (10th Cir. 1988).

Assistant District Attorneys Gillert and Morgan are entitled to summary judgment in their favor. Prosecutors are absolutely immune from civil liability under § 1983 for any act or omission which was undertaken in the scope of their duties in initiating or pursuing a criminal prosecution and in presenting the state's case. *Inbler v. Pachtman*, 424 U.S. 409 (1976). All of the allegations against Gillert and Morgan concern conduct undertaken in the course of their prosecutorial duties. This conduct includes communication with investigating detectives and charging the Plaintiff. Defendants Gillert and Morgan are protected by prosecutorial immunity.

DEFENDANT PARKE

Defendant Parke has moved for dismissal or, alternatively, for summary judgment

based on his assertion of qualified immunity. Based on an examination of Parke's exhibits and affidavits, his motion for summary judgment is granted.

The law of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Unlike other affirmative defenses, qualified immunity is not merely a defense to liability; it is also an immunity from suit. Qualified immunity protects a defendant from discovery, trial and the other burdens of litigation. *Pueblo Health Centers, Inc. v. Losavio,* 847 F.2d 642, 645 (10th Cir. 1988).

Following a plea of qualified immunity, the "court must allow the plaintiff the limited opportunity ... to come forward with any facts or allegations" showing that the defendant violated clearly established law. *Id.* at 646. The court must then determine whether the complaint includes "all of the factual allegations necessary to sustain a conclusion that defendant violated clearly established law." *Powell v. Mikulecky,* 891 F.2d 1454, 1457 (10th Cir. 1989).

Unless and until the plaintiff both demonstrates a clearly established right and comes forward with the necessary factual allegations, the government official is properly spared the burden and expense of proceeding any further." Id. The plaintiff bears a heavy burden once a government defendant pleads qualified immunity. The defendant has no burden to disprove any unsubstantiated claims by the plaintiff. *Celotex,* 477 U.S. at 324.

Plaintiff has not met this heavy burden. He has had the opportunity to respond to Defendant Parke's assertion of qualified immunity and has only restated his belief that the charges were time-barred and that Parke knew or should have known that they were time-barred. Defendant Parke was entitled to rely upon the Assistant District Attorney's advice regarding the statute of limitations. The Tenth Circuit made this clear in *England v. Hendricks,* 880 F.2d 281, 284 (10th Cir. 1989), *cert. den.*, 110 S.Ct. 1130 (1990):

> Since the decision to charge did not violate clearly established law at the time of the officers' actions, they are immune from suit. Further, in an instance such as the one presented, where the law is unclear, a police officer is immune if the officer consulted with and relied upon the advice of a county attorney.

Defendant Parke sought and relied upon the Assistant District Attorneys' advice on the statute of limitations. Gillert and Morgan found that the issue was unsettled and Gillert *directed* Defendant Parke to seek the warrant (Affidavit of Tom Gillert, Docket #13). Plaintiff does not dispute this (Docket #16). Defendant Parke cannot be expected to disregard the Assistant District Attorneys' informed opinions on legal matters; in fact, he should be encouraged to rely on them. Because he sought and relied upon the Assistant District Attorneys' advice, Defendant Parke is immune from this lawsuit.

Apparently in an attempt to defeat the "good faith" aspect of Defendant Parke's claim of good faith immunity, Plaintiff has contended that Defendant Parke deliberately filed an affidavit so broadly stated as to imply that Plaintiff was wanted for murder rather than for accessory to murder (Docket #16). The court has reviewed the affidavit in question. (Defendant Parke's Exhibit C, Docket #13) and finds Plaintiff's allegation totally unwarranted. Also unwarranted are Plaintiff's allegations that Parke made statements to

another person regarding the charge. Plaintiff has offered no proof as to this alleged conversation and cannot simply claim that Defendant Parke implied something in a conversation in which Plaintiff took no part. Defendant Parke has no burden to disprove Plaintiff's unsubstantiated claims. *Celotex*, 477 U.S. at 324.

Defendant Parke's Motion to Dismiss and Alternative Motion for Summary Judgment (Docket #11), Defendant City of Tulsa's Motion to Dismiss and Alternative Motion for Summary Judgment (Docket #14), and Defendants Gillert's and Morgan's Motion for Summary Judgment (Docket #27) are granted.

Dated this 18 day of Oct, 1991.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS ELLIOTT YARDY)
)
Petitioner,)
)
v.) Case No. 91-C-814-B
)
STANLEY GLANTZ, Sheriff of)
Tulsa County,)
Respondent,)
)
AND)
)
THE HONORABLE JOE JENNINGS,)
District Court Judge for)
Tulsa County, and)
DAVID MOSS, District Attorney)
for Tulsa County,)
)
Additional Respondents.)

ORDER

This matter comes on for consideration of the Report And Recommendation of U.S. Magistrate Judge filed herein on October 18, 1991.

The Court, having considered the Report and Recommendation, finds the same should be and the same is hereby adopted and affirmed.

IT IS SO ORDERED, this 18th day of October, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. TWO THOUSAND NINE HUNDRED TWENTY-THREE AND 30/100 DOLLARS ($2,923.30) IN UNITED STATES CURRENCY; and PROCEEDS OF ONE 1930 FORD MODEL A 2-DOOR HOTROD, VIN 3970010; and PROCEEDS OF ONE 1935 4-DOOR LAFAYETTE BY NASH, VIN LE15937; and PROCEEDS OF ONE 1982 FORD MUSTANG FASTBACK, VIN 1FABP16BXCF172966; and PROCEEDS OF ONE 1985 CHEVROLET MONTE CARLO, VIN 1G1GZ37Z6FR169723, Defendant.	)	CIVIL ACTION NO. 91-C-416-E

FILED

OCT 18 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORFEITURE

This cause having come before this Court upon plaintiff's Application filed herein, and being otherwise fully apprised in the premises, the Court finds as follows:

That the verified Complaint for Forfeiture In Rem was filed in this action on the 14th day of June, 1991; the Complaint alleges that the defendant properties are subject to forfeiture pursuant to Title 21 U.S.C. § 881(a)(4) and (a)(6) because they were furnished, or were intended to be furnished, in exchange for a controlled substance, and pursuant to 21 United States Code

constitute proceeds traceable to an exchange of a controlled substance, in violation of Title 21 United States Code, and were used, or were intended to be used to facilitate a violation of the drug prevention and control laws of the United States, Title 21 United States Code.

That a Warrant of Arrest and Notice In Rem was issued on the 24th day of June, 1991, by the Honorable James O. Ellison, Judge of the United States District Court for the Northern District of Oklahoma, as to the defendant properties,

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant properties, on the 10th day of July, 1991.

That the United States Marshals Service personally served all persons having an interest in this action, as follows:

JOHNNY EUGENE GLOVER **July 10, 1991**

That USMS Forms 285 reflecting service on the above-described defendant property and the above-named person are on file herein.

That all persons interested in the defendant properties hereinafter described were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred

first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claims.

That the defendant properties upon which personal service was effectuated more than twenty (20) days ago have failed to file their respective claims or answers, as directed in the Warrant of Arrest and Notice In Rem on file herein.

That the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News on August 29 and September 5 and 12, 1991; and that Proof of Publication was filed of record on the 8th day of October, 1991.

That no other claims, papers, pleadings, or other defenses have been filed by the defendant properties or any persons or entities having an interest therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant properties:

TWO THOUSAND NINE HUNDRED TWENTY-THREE AND 30/100 DOLLARS ($2,923.30) IN UNITED STATES CURRENCY;

and

PROCEEDS OF ONE 1930 FORD MODEL A 2-DOOR HOTROD, VIN 3970010;

and

**PROCEEDS OF ONE 1935
4-DOOR LAFAYETTE BY NASH,
VIN LE15937;**

and

**PROCEEDS OF ONE 1982 FORD
MUSTANG FASTBACK,
VIN 1FABP16BXCF172966;**

and

**PROCEEDS OF ONE 1985 CHEVROLET
MONTE CARLO,
VIN 1G1GZ37Z6FR169723,**

and against all persons and/or entities having an interest in such properties, and that said defendant properties be, and the same are, hereby forfeited to the United States of America for disposition by the United States Marshal according to law, and that no right, title, or interest shall exist in any other party.

S/ JAMES O. ELLISON

JAMES O. ELLISON
Judge of the United States District Court for the Northern District of Oklahoma

CJD/ch

DEA SEIZURE NOS.:

**56537 Re: Currency
56065 Re: 1930 Model A Ford
57063 Re: 1935 Lafayette
57067 Re: 1982 Ford Mustang
57266 Re: 1985 Chevrolet Monte Carlo**

DEA FILE NO. MG-89-0011

FC\GLOVER\01691

entered

GARY A. EATON
1717 E. 15th Street
Tulsa, Oklahoma 74104
(918) 743-8781

LARRY G. GUTTERRIDGE
SIDLEY & AUSTIN
633 West Fifth Street
Suite 3500
Los Angeles, California 90071
(213) 896-6623

Attorneys for Plaintiff
Atlantic Richfield Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY	)	Consolidated Cases
	)	Nos. 89-C-868-C; 89-C-869-C;
Plaintiff,	)	90-C-859-C.
	)	
vs.	)	
	)	
AMERICAN AIRLINES, et al,	)	
	)	
Defendants.	)	

ORDER OF DISMISSAL WITHOUT PREJUDICE

Pursuant to the stipulated agreement between Plaintiff and Section 5 Defendants, and Rule 41(a)(2) of the Federal Rules of Civil Procedure, and for good cause shown, IT IS HEREBY ORDERED that:

1. The Section 5 Defendants named below are dismissed without prejudice from this litigation:

Western Industries Corporation.

2. Each Section 5 Defendant is to bear its own costs and attorney's fees.

DATED: 10-12-91

(Signed) H. Dale Cook

JUDGE OF THE FEDERAL DISTRICT COURT

entered

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Attorneys for Plaintiff
Atlantic Richfield Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY Plaintiff, vs. AMERICAN AIRLINES, et al, Defendants.	)	Consolidated Cases Nos. 89-C-868-C; 89-C-869-C; 90-C-859-C.

ORDER OF DISMISSAL WITHOUT PREJUDICE

Pursuant to the stipulated agreement between Plaintiff and Section 5 Defendants, and Rule 41(a)(2) of the Federal Rules of Civil Procedure, and for good cause shown, IT IS HEREBY ORDERED that:

1. The Section 5 Defendants named below are dismissed without prejudice from this litigation:

Bauer and Sons Packing Company.

2. Each Section 5 Defendant is to bear its own costs and attorney's fees.

DATED: 10-12-91

(Signed) H. Dale Cook

JUDGE OF THE FEDERAL DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. DALE FLETCHER a/k/a DALE R. FLETCHER; CHERYL FLETCHER a/k/a CHERYL L. FLETCHER; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED OCT 17 1991 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA CIVIL ACTION NO. 90-C-0086-C

DEFICIENCY JUDGMENT

This matter comes on for consideration this 15 day of Oct, 1991, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Cheryl Fletcher a/k/a Cheryl L. Fletcher, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed to Cheryl Fletcher a/k/a Cheryl L. Fletcher, 409 South 79th E. Ave., Tulsa, Oklahoma 74112, and all other counsel and parties of record.

The Court further finds that the amount of the Judgment rendered on September 28, 1990, in favor of the Plaintiff United States of America, and against the Defendant, Cheryl Fletcher

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

a/k/a Cheryl L. Fletcher, with interest and costs to date of sale is $68,771.61.

The Court further finds that the appraised value of the real property at the time of sale was $45,400.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered September 28, 1990, for the sum of $40,774.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on October 1, 1991.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Cheryl Fletcher a/k/a Cheryl L. Fletcher, as follows:

Principal Balance as of 9-28-90	$53,533.51
Interest	12,753.82
Late Charges to Date of Judgment	558.36
Appraisal by Agency	500.00
Management Broker Fees to Date of Sale	320.00
Abstracting	205.00
Publication Fees of Notice of Sale	160.92
1990 Ad Valorem Taxes	515.00
Court Appraisers' Fees	225.00
TOTAL	$68,771.61
Less Credit of Appraised Value -	45,400.00
DEFICIENCY	$23,371.61

plus interest on said deficiency judgment at the legal rate of 5.57 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Cheryl Fletcher a/k/a Cheryl L. Fletcher, a deficiency judgment in the amount of $23,371.61, plus interest at the legal rate of 5.57 percent per annum on said deficiency judgment from date of judgment until paid.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PP/esr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BETTY BROYLES, D/B/A BISCUITS PLUS,

Plaintiff,

-vs-

THE TRAVELERS INSURANCE COMPANY, A/K/A THE TRAVELERS, a foreign corporation,

Defendant.

Case No. 91-C-204-C

ORDER FOR DISMISSAL WITHOUT PREJUDICE

NOW ON THIS 12 day of Oct, 1991, upon request by the Plaintiff, Betty Broyles, d/b/a Biscuits Plus, and for good cause shown, this Court hereby dismisses all claims asserted in this action against the Defendant, The Travelers Insurance Company, a/k/a The Travelers, a foreign corporation, without prejudice as to the refiling of the same.

(Signed) H. Dale Cook
United States District Court Judge

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUIS LOVITT WASHINGTON,)
)
Plaintiff,)
)
v.) 91-C-17-C
)
STANLEY GLANZ.)
Defendant.)

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed September 19, 1991 in which the Magistrate Judge recommended that the Plaintiff's Complaint be dismissed and Defendant's request for attorney fees be denied..

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the Plaintiff's Complaint is dismissed and the Defendant's request for attorney fees is denied.

Dated this 15th day of oct, 1991.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBETTE C. YOUNGBLOOD, Plaintiff,	)	
vs.	)	Case No. 90-C-744-E
K-MART CORPORATION, Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Bobbette C. Youngblood, by and through her attorneys, Frasier & Frasier, and dismisses with prejudice the above entitled cause of action pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure.

Respectfully submitted,

FRASIER & FRASIER

By _____
Everett R. Bennett, Jr.
Attorney for Plaintiff

APPROVED:

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By _____
Michael C. Redman
Attorney for K-Mart
Corporation

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 16 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, et al,	)	
Plaintiff,	)	
v.	)	89-C-872-E
HOWARD L. MILLER, et al,	)	
Defendants.	)	

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed May 22, 1991 in which the Magistrate Judge recommended that Plaintiff, the Federal Deposit Insurance Corporation, Manager of the FSLIC Resolution Fund, successor in interest to the Federal Savings and Loan Insurance Corporation, as Receiver for Victor Savings and Loan Association be awarded a Deficiency Judgment against Howard L. Miller and Miller, Meints & Dittrich, an Oklahoma General Partnership in the amount of $146,320.79, plus interest thereon from March 7, 1991, until paid, at the rate of 12.50% per annum, together with a reasonable attorney's fee to be determined by the Court upon application.

It was the further recommendation of the United States Magistrate Judge that the application for determination of attorneys' fees be made on or before ten (10) days following the Court's ruling on this Report and Recommendation.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

Dated this 16th day of October, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DARYL DEE WILSON,)
)
Petitioner,)
)
v.) 89-C-274-B
)
RON CHAMPION,)
)
Respondent.)

ORDER

This order pertains to petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket #2)[1], respondent's Response of November 6, 1990 (#21), and respondent's Response to Court Order of April 2, 1991 (#29). Petitioner is currently incarcerated pursuant to a judgment and sentence entered in Tulsa County District Court, Case No. CRF-86-4380, in which he received a sentence of twenty (20) years imprisonment for Second Degree Burglary after former conviction of two or more felonies. Petitioner was earlier convicted in the District Court of Muskogee County, in Case No. CRF-82-557 of Second Degree Burglary. The former conviction was entered on January 20, 1983, when petitioner was seventeen years of age, and petitioner alleges his certification as an adult prior to that conviction was improper. Petitioner seeks relief from his current incarceration on the basis that the court used the former invalid conviction to enhance his present sentence.

The court has restricted its consideration of petitioner's habeas corpus claims to his allegation that he was denied effective assistance of counsel, because his attorney

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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did not move to have his case transferred to the juvenile courts even though he was only seventeen at the time. The State has countered that the proper procedures were taken by the district attorney to certify petitioner as an adult and therefore there is no merit to petitioner's claim of ineffective assistance of counsel.

Respondent has submitted to the court copies of the Petition for certification, Motion for Certification, and an Order of Certification in Juvenile Proceeding No. JF-82-270 (Exhibits G, H, and I to respondent's Response to Petition for Writ of Habeas Corpus), naming petitioner as the alleged juvenile delinquent in the case. The counts in the certification procedure matched the counts contained in the Information filed in Case No. CRF-82-557. That Information was filed two days after the Order of Certification, dated December 8, 1982, in which Judge Lyle Burris, District Judge for the District Court of Muskogee County, certified petitioner as an adult.

The court found on April 3, 1991, that these documents relating to the certification procedure appeared to be proper, but asked respondent to produce evidence to the effect that the notice provisions of 10 O.S. § 1112(b)[2] were complied with when petitioner was certified as an adult.

Respondents have complied with the court's order and have produced copies of the summons and notice sent to petitioner's parents via certified mail, the return of service filed by petitioner's mother indicating service on December 4, 1982, a transcript of the December 8, 1982 proceedings in which petitioner told the court he had spoken with his

[2] Title 10 O.S. § 112(b) states, in pertinent part, that: "If not included in the original summons, notice of a hearing to consider whether a child should be certified for trial as an adult shall be given to all persons who are required to be served with a summons at the commencement of a juvenile proceeding, but publication in a newspaper when the address of a person is unknown is not required. The purpose of the hearing shall be clearly stated in the notice."

mother and counsel before accelerating the hearing date and proceeding with the certification, and a waiver of certification hearing signed by petitioner saying he had talked over the charges with his parent and had her advice in the matter. Petitioner was present at the hearing with his attorney, but his mother did not appear.

The court concludes that petitioner's certification hearing met the essentials of due process listed in C. P. v. State, 562 P.2d 939, 942 (Okla.Crim.App. 1977):

> 'Because of its critical importance, a certification hearing must measure up to the essentials of due process and fair treatment which requires a hearing before the juvenile judge after adequate notice to the child and his parents, representation by counsel who has been given access to all records or reports which the court may consider, and a statement of reasons for certification sufficient to allow meaningful review of the court's determination.'

(quoting J.T.P. v. State, 544 P.2d 1270, 1275-76 (Okla.Crim.App. 1976)).

There is therefore no merit to petitioner's claim of ineffective assistance of counsel and petitioner cannot show cause excusing his procedural default at the state level and actual prejudice resulting therefrom, as discussed in the Report and Recommendation and Order of U. S. Magistrate filed October 15, 1990 (#19).

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

Dated this 16 day of OCT., 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
JOHNNY LEE SPENCER,	
Debtor.	Case No. 90-03431-W Chapter 11
MARY E. SPENCER, now GENTRY,	
Plaintiff,	
	Adversary No. 91-0101-W
v.	
	Case No. 91-C-499-E
JOHNNY LEE SPENCER,	
Defendant.	

ORDER

This order pertains to defendant's Motion for Leave to Appeal Under 28 U.S.C. § 158(a) the interlocutory order denying the Defendant's Motion to Dismiss Complaint and the order nunc pro tunc allowing the late filing of a complaint of the Bankruptcy Court for the Northern District of Oklahoma dated July 8, 1991.

The facts are as follows. The last day to file an objection to the discharge of the debtor was February 11, 1991. On that date, plaintiff and Trustee Scott Kirtley ("Kirtley") filed Motions for Extension of Time to file complaints objecting to the discharge under 11 U.S.C. §§ 727 and 523. Kirtley and plaintiff had been exchanging information and evidence due to their common interest in recovering certain assets which debtor allegedly transferred in violation of the Oklahoma Uniform Fraudulent Transfers Act and the Bankruptcy Code. On February 12, 1991, the Bankruptcy Court granted Kirtley's motion and extended the time to object to discharge through April 11, 1991. Plaintiff received no

notice of her motion being extended, but proceeded to file her complaint when Kirtley filed his on April 11, 1991. Debtor did not object to the motions for extension of time.

On May 3, 1991, debtor filed a Motion to Dismiss Complaint and plaintiff filed her response to the motion on May 22, 1991. On July 8, 1991, the Bankruptcy Court granted plaintiff's Motion for Extension of Time Nunc Pro Tunc, allowing plaintiff to file a complaint under 11 U.S.C. § 727 and/or § 523 on or before April 11, 1991, and denied the motion to dismiss. On July 11, 1991, defendant filed his answer to complaint. No motion to vacate the court's orders was filed, so no hearing was held by the Bankruptcy Court on the matter. On July 12, 1991, defendant filed this appeal.

Defendant alleges that the court did not have the authority to allow the filing of a complaint based on the order extending the filing time that was not filed until five months later. Defendant relies on In Re: Brayshaw, 912 F.2d 1255 (10th Cir. 1991), which ruled that motions for extensions of time to object to bankruptcy exemptions must be filed and granted before the time limit expires. Defendant also claims that the right to discharge is a property right and therefore his due process rights under the Fifth Amendment were violated by the Bankruptcy Court's rulings. Defendant cites no authority to support his due process argument.

The court notes that the ruling by the Tenth Circuit Court of Appeals in Brayshaw expressly applied to filing of objections to a debtor's claimed exemptions under Bankruptcy Rule 4003(b), which provides that "[t]he trustee . . . may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors . . . unless, within such period, further time is granted by the court." The rules involved

in this appeal, Bankruptcy Rule 4004(b)[1] and 4007(c),[2] only assert a single requirement that the motion seeking an extension of time to object to discharge be filed before the sixty-day time limit expires. The ruling in Brayshaw is therefore inapplicable to this case.

The order of the Bankruptcy Court granting the late filing of plaintiff's complaint is not appealable, as it was not a final order. Under 28 U.S.C. § 158(a),[3] appeals from a final order of the bankruptcy court are a matter of right. Because of the nature of bankruptcy proceedings involving numerous creditors with claims against a debtor's estate, the term finality does not have exactly the same meaning as it does in other civil proceedings.

"[O]rders in bankruptcy cases may be immediately appealable if they finally dispose

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[1] Bankruptcy Rule 4004 reads in part as follows:

> (a) **Time for Filing Complaint Objecting to Discharge; Notice of Time Fixed.** In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). In a chapter 11 reorganization case, such complaint shall be filed not later than the first date set for the hearing on confirmation. Not less than 25 days notice of the time so fixed shall be given to all creditors as provided in Rule 2002(f) and to the trustee and the trustee's attorney.
>
> (b) **Extension of Time.** On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be made before such time has expired.

[2] Bankruptcy Rule 4007(c) reads:

> (c) **Time for Filing Complaint Under § 523(c) in Chapter 7 Liquidation and Chapter 11 Reorganization Cases; Notice of Time Fixed.** A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

[3] Title 28 U.S.C. § 158 provides in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title . . . .

of discrete disputes within the larger case . . . ." In re Saco Local Development Corp., 711 F.2d 441, 444 (1st Cir. 1983) (emphasis in original). Thus, an order by the bankruptcy judge dismissing a complaint objecting to discharge of a debt as untimely is a final appealable order, because in that situation the creditor's ability to legally enforce a debt expires and the debt owed is dischargeable and not recoverable. Matter of Riggsby, 745 F.2d 1153, 1154 (7th Cir. 1984).

However, an order granting a complaint objecting to dischargeability of a debt as timely is not a final order, as it does not fix the obligations of the parties, and merely permits a creditor to argue non-dischargeability of a debt. Connelly v. Shatkin Investment Corp., 57 B.R. 794, 796 (N.D. Ill. 1986).

Likewise, the order of the Bankruptcy Court granting the late filing of plaintiff's complaint did not fix the obligations of the parties and merely permitted plaintiff to argue that the debtor not be discharged. It was not a final order.

Because bankruptcy appeals are to be taken in the same manner as appeals in civil matters, generally, the court finds the statutory provision governing interlocutory appeals from district courts to appellate courts should be applied. 28 U.S.C. § 1292(b); In re Johns-Manville Corp., 47 B.R. 957 (S.D.N.Y. 1985). In general, exceptional circumstances must be present to warrant allowing an interlocutory appeal. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1977). Title 28 U.S.C. § 1292(b) mandates three conditions requisite to an interlocutory appeal: (1) the existence of a controlling question of law; which (2) would entail substantial ground for differences of opinion; and (3) the resolution of which would materially advance the ultimate termination of the litigation.

The order of the Bankruptcy Court granting the late filing of plaintiff's complaint does not involve any of these conditions. Thus, this court is compelled to deny the motion for leave to appeal that order. The defendant's motion to dismiss complaint was founded on the lack of an extension of time to file that complaint and was rendered moot by the order granting a late filing. It should be noted that defendant filed an answer to plaintiff's complaint on the day he filed this appeal. The order denying defendant's motion to dismiss complaint is also not appealable, as it was not a final order fixing any obligations of the parties and did not meet any of the conditions set out in Coopers & Lybrand v. Livesay. There is no merit to defendant's allegations of denial of due process, as he was afforded notice and an opportunity for hearing regarding plaintiff's filings. He did not take advantage of the opportunity for hearing.

Defendant's Motion for Leave to Appeal Under 28 U.S.C. § 158(a) is denied.

Dated this 16TH day of October, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KANSAS CITY FIRE & MARINE INSURANCE COMPANY,

Plaintiff,

v.

MATHEW DOUGLAS, et al,

Defendants,

and

SAND SPRINGS INDEPENDENT SCHOOL DISTRICT #2,

Defendant and Third Party Plaintiff,

v.

SHELTER MUTUAL INSURANCE COMPANY,

Third Party Defendant.

90-C-874-C

ORDER

This order pertains to Defendant and Third-party Plaintiff, Independent School District #2's Motion for Summary Judgment (Docket #13)[1], Plaintiff Kansas City Fire & Marine Insurance Company's Motion for Summary Judgment (#15), Third Party Plaintiff's Motion for Summary Judgment Against Third Party Defendant (#28), Defendants, Independent School District #2, Tulsa County, Oklahoma, and Jim Jackson's Motion for Summary Judgment Against Plaintiff (#29), and Third-party Defendant, Shelter Mutual

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

Insurance Company's Motion for Summary Judgment (#30). A hearing was held on September 26, 1991 and oral arguments were heard.

Plaintiff, Kansas City Fire & Marine Insurance Company ("Kansas City"), seeks a declaratory judgment determining whether or not the comprehensive liability insurance policy it issued to Sand Springs Independent School District #2 ("Sand Springs") covers alleged tortious actions of a Sand Springs employee. Shelter Mutual Insurance Company ("Shelter") is joined in this proceeding as a third-party defendant pursuant to Sand Springs' third-party complaint, which avers that either the Kansas City or Shelter policy covers the disputed event.

The following facts are undisputed. On January 14, 1988, the behavior of students on Sand Springs school bus #39 became so unruly that the safe navigation of the bus was jeopardized. To ensure the safety of the bus and its passengers, the driver, in accordance with school policy, returned to the bus barn seeking disciplinary assistance. Upon arrival, the driver parked and turned off the bus. Sand Springs employee Jim Jackson ("Jackson") then entered the bus to offer assistance. While attempting to regain control of the rowdy students, Jackson allegedly injured Mathew Douglas ("Douglas"). A comprehensive liability insurance policy issued to Sand Springs by Kansas City was in effect when the alleged incident occurred.[2] The comprehensive policy issued by Kansas City covered, among other

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[2] The policy issued by Kansas City contains the following exclusion:

> This insurance does not apply:
>
> . . . .
>
> (b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> (1) any automobile or aircraft owned or operated by or rented or loaned to any insured, or

things, injuries caused by disciplinary action taken by Sand Springs employees. Concurrently operative was an automobile insurance policy issued by Shelter.[3]

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

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(2) any other automobile or aircraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining if such automobile is not owned by or rented or loaned to any insured . . . .

[3] The policy issued by Shelter includes the following provision:

1. COVERAGE A--Bodily Injury Liability; COVERAGE B--Property Damage Liability-- The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. Bodily injury sustained by any person;

B. Property damage sustained by any person:

caused by accident and arising out of the ownership, maintenance, or use of the described automobile or a non-owned automobile, and the Company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false, or fraudulent; but the Company may make such investigation or settlement of any claim or suit that it deems expedient.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing . . . are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

The specific question of law presented is whether Douglas's alleged injury "arises out of the ownership, maintenance, operation, [or] use" of bus #39 and is thereby excluded from the coverage of Kansas City's comprehensive liability insurance policy, and covered by Shelter's automobile insurance policy.

Kansas City contends that the alleged injury arose out of the use of the bus and is excluded from the coverage of its policy. In support of its conclusion, Kansas City cites Suburban Bus Co. v. National Mutual Casualty Co., 183 S.W.2d 376 (Mo. Ct. App. 1944). In Suburban, a bus driver was forced to take disciplinary action while taking children home from school. Attempting to gain control over two rowdy children, the driver stopped the bus, picked up a fire extinguisher, and aimed it threateningly at them. Accidentally, the extinguisher discharged into a child's face. The Missouri court found that the children's behavior interfered with the safe operation of the bus, and that the driver's regulatory action was therefore incident to the use of the bus. The court held that the injury "arose

out of" the use of the bus.[4]

Contending that its policy does not cover the injury, Shelter advances three arguments. First, Shelter asserts that the subsequent conduct of Sand Springs clarifies any uncertainty regarding the language and applicability of the policies. Following the incident, Sand Springs Superintendent Wendell Sharpton expressed his belief that the injury did not arise out of the use of the bus, but was simply the result of normal, disciplinary action that happened to occur on the bus. Second, Shelter argues that its policy does not cover the incident because it only applies to injuries resulting from "accidents". They claim that the injury sustained by Douglas was not an accident because Douglas's own intentional conduct necessitated the disciplinary action. Third, relying on Safeco Ins. Co. v. Sanders, 803 P.2d 688 (Okla. 1990), Shelter argues that the bus was not the dangerous instrument that started the chain of events leading to the injury. It was merely the situs of the disciplinary action.

The ruling in Safeco is binding on this court and controls the resolution of this dispute. Because Safeco sufficiently defines the contested policy language, it is unnecessary to confront the first two arguments posed by Shelter. In Safeco, two individuals were abducted while sitting in a parked car. Id. at 689. The abductors drove the abductees to a remote location, locked them in the trunk of the insured vehicle, cut its fuel line, and set the car ablaze. Id. To determine whether the death of the occupants arose out of the use of the car, the Oklahoma Supreme Court utilized the chain of events test established in

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[4] An Oklahoma court could very well reach the same conclusion by applying the "chain of events" test first set out in Oklahoma Farm Bureau v. Mouse, 268 P.2d 886 (Okla. 1954) to these facts. The injury was caused by the malfunction of a bus fire extinguisher, which was a piece of equipment immediately connected to the bus. Suburban must be distinguished factually from the case at bar.

Oklahoma Farm Bureau Mutual v. Mouse. Safeco, 803 P.2d at 691.

In Mouse, a truck driver was transporting a combine, and the breather pipe got caught on a bridge. The driver climbed to the top of the combine. While struggling to free the wedged pipe, it broke and the driver fell to the pavement below. The Mouse court declared that, when an injury is caused by something "physically attached to or immediately connected in some manner to the vehicle or its operation, the injury resulted from the use of the vehicle." Id. Because the truck was the dangerous instrument causing the chain of events leading to the injury, the court found that Mouse's injury arose out of the use of the truck. Using similar logic, the Safeco court concluded that the death of the occupants arose out of the use of the vehicle because the car itself was the "deadly instrumentality" that was used to inflict death. Id. at 692-93.

In response, Kansas City adopts the liberal reasoning propounded in Suburban Bus Co.. Kansas City argues that, because the driver could not adequately control the behavior of the passengers, he was required by school policy to return to the bus barn to ensure the safe operation of the bus. Because the disciplinary action that allegedly injured Douglas was regulatory in nature and arose out of the need to ensure the safe use of the bus, Kansas City asserts that the injury must have arisen out of the use of the bus.

Both Safeco and Mouse clearly demonstrate that, in order to find that an injury did in fact arise out of the use of the vehicle, the vehicle or part of it must have been instrumental in precipitating the injurious event. Kansas City has failed to show that the bus or any part of it was instrumental in bringing about Douglas's alleged injury.

Kansas City has failed to persuasively rebut Shelter's argument that the bus was not the instrument of injury, but was merely the situs. Justice Wilson cited four cases in footnote 10 of the Safeco opinion that illuminate the question of whether or not the vehicle was merely the situs of the injury. Id. at 693. In each of these cases the use of a vehicle was involved, but the vehicles were simply the sites of the deaths, not the dangerous instruments that ultimately caused the deaths.

The court must consider the unique facts of this case. Id. at 690. Sand Springs acquired a comprehensive policy from Kansas City to cover injuries arising from disciplinary action. This policy clearly excluded coverage of injuries that might occur due to the use of Sand Springs buses. To provide for this exigency, Sand Springs acquired an automobile policy from Shelter. The alleged injury was concededly the result of disciplinary action taken by Jackson. It was not the result of a chain of events initiated by bus #39, nor any part of it. Bus #39 was merely the situs of the incident. Thus, the alleged injury did not arise out of the ownership, maintenance, operation, or use of the bus, and is therefore covered by the comprehensive insurance policy issued by Kansas City.

Defendant and Third-party Plaintiff, Independent School District #2's Motion for Summary Judgment (#13), Third Party Plaintiff's Motion for Summary Judgment Against Third Party Defendant (#28), Defendants, Independent School District #2, Tulsa County, Oklahoma, and Jim Jackson's Motion for Summary Judgment Against Plaintiff (#29), and Third-party Defendant, Shelter Mutual Insurance Company's Motion for Summary Judgment (#30) are granted, and Plaintiff Kansas City Fire & Marine Insurance Company's Motion for Summary Judgment (#15) is denied.

Dated this 16th day of October, 1991.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANTHONY RAY JONES,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS, OF TULSA COUNTY, OKLAHOMA, et al.,

Defendants.

No. 88-C-1448-E

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

Now, on this _____ day of October, 1991 comes on for hearing the above-styled and numbered cause. Plaintiff Anthony Ray Jones appears through his attorney of record, Ted Vogle. Defendants Board of County Commissioners of Tulsa County, Dick Wales, Ron Akins, Dan Cisco, Larry Wayne Byard, and Randal Frank McDonald appear by and through their attorney of record, Phil R. Richards. The Court finds that the parties have entered into the following stipulations:

1. On October 7, 1991 the Board of County Commissioners of Tulsa County, Oklahoma accepted the offer of settlement of Plaintiff, and authorized its attorney of record to confess judgment in this cause in the amount of $40,000 under the following conditions:

   a. The Defendants are in no way admitting liability or fault on the part of the Board of County Commissioners of Tulsa County, the Sheriff of Tulsa County, Dick Wales, Ron Akins, Dan Cisco, Larry Wayne Byard, Randal Frank McDonald or any other agent, servant, employee or

representative of the Sheriff of Tulsa County or the County of Tulsa, Oklahoma;

b. That the settlement of this cause will result in a full release of any and all past, present or future claims against the Board of County Commissioners of Tulsa County, the Sheriff of Tulsa County, Dick Wales, Ron Akins, Dan Cisco, Larry Wayne Byard, Randal Frank McDonald and any other agent, servant, employee or representative of the Sheriff of Tulsa County or the County of Tulsa, Oklahoma which Plaintiff Anthony Ray Jones has or may have a result of the occurrence out of which this litigation arises, regardless of whether such claims were asserted or unasserted in this litigation;

c. That the settlement of this cause will result in a full release of any and all past, present or future claims for attorneys fees under 42 U.S.C. §1988, and costs associated with the prosecution of this action, against the Board of County Commissioners of Tulsa County, the Sheriff of Tulsa County, Dick Wales, Ron Akins, Dan Cisco, Larry Wayne Byard, Randal Frank McDonald, or any other agent, servant, employee or representative of the Sheriff of Tulsa County or the County of Tulsa,

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Oklahoma which Plaintiff Anthony Ray Jones has or may have as the result of this litigation and judgment;

d. In consideration of the Confession of Judgment by the Board of County Commissioners of Tulsa Count pursuant to the terms of this settlement, judgment shall be entered in favor of all remaining Defendants to this litigation including the Sheriff of Tulsa County, and Defendants Dick Wales, Ron Akins, Dan Cisco, Larry Wayne Byard and Randal Frank McDonald upon the claims of Plaintiff Anthony Ray Jones asserted in this litigation, which judgment shall foreclose the assertion of any other claims, whether now known or unknown, arising out of the occurrence which is the subject of this litigation, and that said Defendants and Plaintiff shall bear their respective costs and attorneys fees incurred in litigating this cause.

2. The Plaintiff is fully aware of the conditions upon which this Confession of Judgment is made, has had the advice of counsel, and knowingly and voluntarily accepts said conditions without reservation.

The Court accepts these stipulations and, based upon said stipulations finds that judgment should be entered in the sum of $40,000 against the Board of County Commissioners of Tulsa County, Oklahoma, only; and the Court further finds that judgment should be

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entered in favor of all other Defendants in this litigation, with each party to bear its own costs and attorneys fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Anthony Ray Jones have and recover judgment against the Defendant Board of County Commissioners of Tulsa County, Oklahoma, in the sum of $40,000, said judgment to bear interest from the date hereof at the statutory rate of ten percent per annum, with each party to bear its own costs and attorneys fees incurred in this litigation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of all other Defendants to this action and against Plaintiff Anthony Ray Jones, with each party to bear its own costs and attorneys fees incurred in the prosecution of this litigation.

HONORABLE JAMES O. ELLISON
Judge of the United States
District Court

APPROVED:

Anthony Ray Jones
Plaintiff

Ted Vogle
Attorney for Plaintiff

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Phil R. Richards
Attorney for Defendant Board of
County Commissioners of Tulsa
County, Oklahoma, Sheriff of Tulsa
County, Dick Wales, Ron Akins,
Dan Cisco, Larry Wayne Byard and
Randal Frank McDonald

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AMERICAN NATIONAL BANK & TRUST COMPANY OF SAPULPA, Guardian of WILLIAM BROOKS BALTHIS, DEBRA LEANNE BALTHIS and DAVID DOUGLAS BALTHIS, minor children, Plaintiff, vs. BIC CORPORATION, HUBERT BROOKS and DOROTHY BROOKS, Defendants.	CASE NO.: 91-C-298-E

ORDER

The Court has for consideration the plaintiff's motion to remand the case to the District Court of Creek County, Oklahoma, from which it was removed by the defendant. Plaintiff argues that BIC Co. failed to sufficiently plead its allegation of fraudulent joinder justifying removal, and that even if joinder of defendants Brooks had been fraudulent, BIC is out of time.

Removal jurisdiction requires both that there be complete diversity and that no defendant be a citizen of the forum state. 28 U.S.C. Sec. 1441. Plaintiffs destroyed diversity of citizenship for removal purposes by joining Hubert and Dorothy Brooks, the grandparents of the Balthis children and Oklahoma residents, as additional defendants. Nevertheless, it is established that the characterizations in the complaint will not be controlling if there has been fraudulent joinder. Marquette Nat'l Bank v. First Nat'l

Bank of Omaha, 422 F.Supp. 1346, 1349 (1976). Accordingly, a defendant who is fraudulently joined is to be disregarded in determining the existence of diversity jurisdiction. Id. at 1350.

Determination of fraudulent joinder is to be based on whether there was a real intention on colorable grounds to procure a joint judgment. Parks v. New York Times Co., 308 F.2d 474, 477, cert. denied, 376 U.S. 949, 84 S.Ct. 964, 11 L.Ed.2d 969 (1962). Or as stated in Leinberger v. Webster, defendant would have to show either that plaintiff's complaint evidences no intention to obtain a joint judgment, or a lack of colorable factual support for plaintiff's allegations concerning Hubert and Dorothy Brooks. 66 F.R.D. 28, 31 (1975).

In addition, a claim of fraudulent joinder must be pleaded with particularity, and supported by clear and convincing evidence, Parks, 308 F.2d at 478; and bad faith in joining a resident defendant must be proven with certainty, id. The essence being that the burden on a motion to remand to the state court is on the party who removed to the federal court. Id. at 477.

The defendant BIC Co. has not met its burden in proving by clear and convincing evidence that the joinder at issue is fraudulent. The mere fact of a good relationship between the plaintiffs and the defendant Brooks cannot by itself prove that there is no good faith intent to obtain a judgment concerning Brooks' liability. See e.g. Leinberger. Intent to "obtain a judgment" (apportion liability) and not intent to collect is the determinative factor. See generally, Leinberger; Parks; and Avco

Co., (these cases state that intent to obtain a judgment against both parties is the test for good faith joinder. Nowhere do they refer to intent to collect judgment.) And given that questions concerning Brooks' negligence will affect a jury's determinations, it seems more than reasonable that the Brooks' liability is assessed at the same time we try to determine the liability of BIC Co.

"That the defeat of removal might have been a motive in joining [the defendant] is not important, if in good faith he is sought to be held liable." Parks, 308 F.2d at 477. In addition, if the plaintiff has stated a cause of action against the resident defendant, that is normally sufficient to prevent removal. The motive for joining such a defendant is immaterial. Id. at 478. In conclusion, there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard. Id. On the cause alleged in this case it is not clear at all that there can be no recovery against the Brooks. To the contrary, a genuine dispute as to their negligence and resulting liability exists.

What's more, it would appear that Bic's notice of removal was not timely filed. According to 28 U.S.C.A. Sec. 1446(b):

> . . .
> If the case stated by the initial pleadings is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is

one which is or has become removable. (emphasis added).

The case as stated by the initial pleadings was removable, therefore plaintiffs should have removed at that time. Only if the case was not removable as stated by the initial pleadings can defendants take advantage of the statute's clause allowing thirty days after receipt of some paper. But that paper has to be the first indication that the case is removable. The statute is not saying that any paper at any time gives thirty days to defendants within which to file for removal.

Contrary to defendant's assertions, the Court of Appeals decision in American Nat'l Bank and Trust Co. of Sapulpa v. Bic Co., 931 F.2d 1411 (10th Cir. 1991), is not a "motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable." That provision relates only to papers filed in the action itself which alter or clarify the stated claim so as to reveal for the first time that a federal cause of action is stated; it does not include as an "order or other paper" a subsequent court decision in a wholly unrelated case defining what constitutes a basis for removal to the federal court. Sclafani v. Insurance Co. of North America, 671 F.Supp. 364, (1987) (emphasis added); Avco Co. v. Local 1010 of the Int'l Union, 287 F.Supp. 132 (D.Conn.1968).

Defendants also argue that the depositions of Brooks and Balthis were "other paper" giving them thirty days within which to file for removal. But the defendants filed for removal before the depositions, making therefore obvious the fact that the depositions

were not the first paper from which it could be ascertained that the case was removable.

Joining the Brooks as defendants in this case is not fraudulent, and even if it were, Bic's allegations of fraudulent joinder are arguably untimely. Accordingly, this case will be remanded to the District Court of Creek County, Oklahoma.

ENTERED this 16th day of October, 1991.

UNITED STATES DISTRICT JUDGE

HON. JAMES O. ELLISON

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

T & L DRILLING, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	90-C-505-E
	)	
JOHN B. JARBOE, et al,	)	
	)	
Defendants.	)	

ORDER AND OPINION

John B. Jarboe, trustee for Gin, Inc. ("GIN"), is before the Court appealing a July 5, 1990 decision by the United States Bankruptcy Court For The Northern District Of Oklahoma. In that decision, the Bankruptcy Court found that T&L Drilling, Inc. ("T&L") did not receive notice of Gin's 1983 Chapter 7 bankruptcy proceeding. Since T&L did not receive notice, the Bankruptcy Court allowed the drilling company to file its unsecured claim and to receive property distribution in the Gin estate in the order of priority provided for in 11 U.S.C. §726(a)(2)(C). The United States Magistrate Judge recommends the Bankruptcy Court's decision be affirmed.

Facts

T&L drilled a well in Kingfisher County, Oklahoma for Gin. Gin paid for T&L's materials and services with a $122,193.44 check. *Transcript Of Hearing On Motion Of T&L Drilling To Allow Claim, May 31, 1990, page 8.* The check bounced. T&L then filed a lien, which was reduced to judgment on July 14, 1982. *Brief Of Appellee, page 4 (docket #4).*

Six days after the judgment in Kingfisher County, Gin filed for bankruptcy under Chapter 11. Three months later, T&L filed for Chapter 11 bankruptcy. *Brief Of Appellant,*

page 2 (docket #3).[1] On April 25, 1983, Gin's case was converted to a Chapter 7 proceeding. *Id.*

Following the Chapter 7 conversion, the Bankruptcy Court scheduled a September 12, 1983 meeting of creditors.*Id. at page 2.* According to a certificate of mailing, the court clerk mailed a notice of that meeting to all creditors, including T&L. *Transcript at page 30.*[2] The notice stated that claims against Gin would not be allowed if they were filed later than 90 days after the September 12, 1983 meeting. T&L failed to meet that deadline in filing its claim.

On May 2, 1990 -- some seven years after the deadline -- T&L filed its claim against Gin for $129,233.44. *Order, June 5, 1990, page 1.* On May 11, 1990, T&L filed a motion to allow the claim with the Bankruptcy Court. Jarboe objected. The Bankruptcy Court heard both parties' arguments on the issue during a May 31, 1990 hearing.

During that hearing, Tom Tarrant, T&L's chief executive officer, testified that he did not receive notice of the September 12, 1983 Meetings of Creditors or of Gin's conversion to Chapter 7.[3] Jarboe submitted the Certificate of Mailing as evidence the notice was mailed. The Bankruptcy Court then ruled that T&L did not receive notice of Gin's Chapter 7 proceeding, and, as a result, its $129,233.44 unsecured claim would be allowed. *See*

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[1] *On October 12, 1982, T&L -- suffering "severe financial hardship" as a result of not collecting Gin's debt -- filed for bankruptcy under Chapter 11 in the Western District of Oklahoma. Motion To Allow Claim, May 11, 1990, page 2. The bankruptcy case was later converted to a Chapter 7 proceeding. The T&L case was closed May 11, 1989, but Tarrant testified that he and/or the estate still have debts remaining that need to be paid. Transcript at page 15.*

[2] *The Bankruptcy Court apparently found that the notice was mailed "assuming the clerk did their job." Id. at page 31.*

[3] *Tarrant testified at the May 31, 1990 Bankruptcy Court hearing that he did not receive any notice of Gin's Chapter 7 proceeding and the Meeting of Creditors. Transcript Of Hearing On Motion Of T&L Drilling To Allow Claim, May 31, 1990, page 9. He also said that any notice to T&L would have been sent to him at either his home or to the T&L office. Id. at page 10. At the conclusion of that hearing, the Bankruptcy Judge said he was "not convinced that Mr. Tarrant had notice or knowledge of the conversion." Id. at page 32. Tarrant, however, did have knowledge that Gin had filed bankruptcy.*

Order, June 5, 1990. Jarboe now appeals that ruling (*See docket #1).*

Legal Analysis

The first issue to be considered is whether the Bankruptcy Court's decision that T&L did not receive notice is a finding of fact or a legal conclusion. This Court must accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. *In Re Herd, 840 F.2d 757, 759 (10th Cir. 1988).* Conclusions of law are subject to de novo review by this Court.*Id.*

Jarboe, the Appellant, frames the issue as a legal question. He contends the certificate of mailing presumes notice was given. Tarrant's testimony, Jarboe argues, is strong enough evidence to overcome the presumption. Therefore, Jarboe concludes, the Bankruptcy Court erred in holding the notice invalid. *Brief Of Appellant, pp. 6-7 (docket #3).* He asserts that Tarrant's testimony should not be enough evidence to overcome the certificate of mailing presumption. *Id.* T&L disagrees, arguing that its failure to receive notice was a finding of fact. *Brief Of Appellee, pp. 7-8 (docket #4).*

The facts of *In Re Longardener & Associates*, Inc. resemble T&L's situation. In that case, the Bankruptcy Court mailed a notice of a confirmation hearing to all creditors, including the appellant. *In Re Longardener & Associates, 855 F.2d 455, 458 (7th Cir. 1988).* The notice, which was not returned to the clerk's office, had the appellant's correct address. *Id.* However, the appellant, similar to Tarrant, testified he did not receive any notice. *Id.*

In reviewing the Bankruptcy Court's decision, the Seventh Circuit held that once a notice is "properly addressed, stamped and mailed", a presumption exists that the creditor received it. *Id. at 459.* And the court held that denial of the receipt, without more

evidence, does not rebut the presumption. It "merely creates a question of fact." *Id.*[4]

In the instant case, such a question of fact surfaced. Jarboe submitted the certificate of mailing as evidence that the court clerk mailed the notice. This submission triggered a presumption that T&L received the notice. However, Tarrant -- T&L's CEO -- testified that he did not receive the notice. That set up a question of fact for the Bankruptcy Court to decide.

Findings of fact are clearly erroneous where the findings are without substantial evidence to support them. *Celona v. Equitable National Bank, 98 B.R. 705, 706 (E.D. Penn. 1989).* But such findings will not be disturbed unless a reviewing court is left with a "definite and firm conviction that a mistake has been made". Furthermore, where there are two or more permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Id.*

In this case, the Bankruptcy Judge apparently questioned whether the certificate of mailing indicated the clerk mailed the notice. See, Transcript at page 31.[5] In addition, the judge emphasized the importance of Tarrant's direct testimony. Transcript at page 31. After balancing the evidence, the Bankruptcy Judge apparently concluded that Tarrant's direct testimony was more credible than the certificate of mailing.

That ruling does not create in this Court a "definite and firm conviction that a mistake was made". The Bankruptcy Court found the evidence of Tarrant's testimony strong enough to overcome any presumption that the notice was received. *See In Re Yoder, 758*

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[4] *The Sixth Circuit has concluded that once a presumption under Federal Rule of Evidence 301 is rebutted, it has no probative effect. In Re Yoder, 758 F.2d 1114, 1120 (6th Cir. 1985).*

[5] *Said Wilson: "Mr. Jarboe tells me that he did what he could to the effect of directing the Clerk, or at least assuming the clerk did their job..."*

F.2d 1114 (6th Cir. 1985)0.[6] This Court cannot disturb that finding simply because there may be other permissible views of the evidence.[7] As a result, the Bankruptcy Court's factual finding is not clearly erroneous and will not be disturbed.

The second issue asserted by Jarboe is that the Bankruptcy Court exceeded its authority by extending T&L's deadline for filing its proof of claim. Jarboe argues that such a decision violates Bankruptcy Rule 3002(c). *Brief Of Appellant, page 5.* This Court disagrees. The issue is whether T&L was denied due process because it did not receive notice.[8]

Actual notice must be given to all known creditors under Bankruptcy Rule 2002(a) of the time set for filing proofs of claims. *Sheftelman v. Standard Metals Corp., 839 F.2d 1386 (10th Cir. 1987).* Such notice must be given to satisfy due process requirements. *Id.* Wrote the Tenth Circuit:

> **A fundamental right guaranteed by the Constitution is the opportunity to be heard when a property interest is at stake. Specifically, the reorganization process depends upon all creditors and interested parties being properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests.** *Reliable Electric Co. v. Olson Construction Co., 726 F.2d 620, 623 (10th Cir. 1984).*

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[6] *The United States Supreme Court has emphasized that "the notice should be of such nature to reasonably convey the required information." Mullane v. Central Hanover Bank & Trust, 70 S.Ct. 652, 657 (1950), quoted in Re Herd, 840 F.2d 757, 759 (10th Cir. 1988). In the instant case, the Bankruptcy Court found that T&L did not receive notice as a finding of fact. The issue was not the adequacy of notice, which appellant argues. However, even assuming the question was adequacy of notice, the fact that T&L had knowledge of Gin's status in bankruptcy does not negate statutory notice. In Re Herd, 840 F.2d at 759. Furthermore, the Supreme Court also has held that a creditor, who has general knowledge of a debtor's reorganization proceeding, has no duty to inquire about further court action. New York v. New York, New Haven & Hartford R.R. Co., 73 S.Ct. 299, 301 (1953). The creditor has a "right to assume" he will receive all of the notices required by statute before his claim is forever barred. Id.*

[7] *Bankruptcy Rule 8013 states: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.*

[8] *This is a conclusion of law and will be renewal de novo.*

The Bankruptcy Court, as a finding of fact, concluded that T&L did not receive notice. Once it made that ruling, the only question remaining was whether T&L's due process was violated, and, if so, what remedy was available. The court then allowed the claim to be filed, despite its tardiness. *Transcript at page 32.*[9]

This Court agrees that T&L's due process was violated. No notice was received about Gin's conversion to a Chapter 7 bankruptcy proceeding. At no time was T&L notified so it could protect its property interests. Consequently, the Bankruptcy Court's decision to allow the claim was proper.[10]

Conclusion

The finding of fact that T&L did not receive notice is not clearly erroneous. The Bankruptcy Court's legal conclusion that T&L should be able to file its claim late due to the lack of notice is proper. As a result, T&L should be allowed to submit its unsecured claim and receive property distribution in the Gin estate in the order of priority provided for in 11 U.S.C. §726(a)(2)(C).

Therefore, the Court finds that the Bankruptcy Court's decision should be and hereby is affirmed.

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[9] *A case cited by Appellant Jarboe states: "The principle is clear that, where the creditor does not receive notice of the deadline within which to file proofs of claims, the bankruptcy court, as a court of equity, may permit the late filing of claims." In Re Cmehil, 43 B.R. 404, 406 (Bkrtcy. N.D. Ohio 1984).*

[10] *There does not seem to be a case directly on point in the Tenth Circuit. However, this Court is persuaded by the discussion in a New York district court decision. The court there held that "no notice creditors may file a claim entitled to pari passu distribution status at anytime before the final distribution is made. In Re Columbia Ribbon & Carbon Mfg. Co. Inc., 54 B.R. 714, 721 (S.D.N.Y. Bkrtcy. 1985). Final distribution has not been made in the instant case. Therefore the Bankruptcy Court properly allowed the claim to be filed.*

Dated this 15th day of October, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL SPICCIOLI,

Plaintiff,

-vs-

NICHOLAS WATERS,

Defendant.

Case No.: 91-C-371 B

~~MOTION TO DISMISS~~ Notice of Dismissal

COMES NOW the Plaintiff MICHAEL SPICCIOLI by and through his counsel, Mike McGrew, and dismisses the within action without prejudice.

RALSTON, BUCK & ASSOCIATES

s/ Mike McGrew

MIKE MCGREW, OBA #013167
625 N.W. 13th Street
Oklahoma City, OK 73103
(405) 528-0004

Attorneys for Plaintiff(s)

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing Motion to Dismiss was mailed, postage prepaid, by depositing it in the United States Mail on the _____ day of _____, 1991, to the following: Nicholas Waters, 3553 Delaware, Muskogee, Oklahoma 74403.

Ann Wendorff

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 11 199

Richard M. Lawrence
U. S. DISTRICT C
NORTHERN DISTRICT OF

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES L. BURDEX, et al.,

Defendants.

CIVIL ACTION NO. 91-C-661-B

O R D E R

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Defendant, Robert L. Schoonover, Guardian of Albert H. Schoonover, shall be dismissed without prejudice.

Dated this 10 day of oct, 1991.

/S/ Thomas R. Brett
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

Wyn Dee Baker

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WDB/esr

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OCT 11 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BOBBY DALE VINSON,

Plaintiff,

vs.

ASSOCIATED MILK PRODUCERS, INC.,

Defendant.

Case No. 90-C-385-E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, BOBBY DALE VINSON, and the Defendant, ASSOCIATED MILK PRODUCERS, INC., and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, dismiss, with prejudice, the above styled cause of action.

ATTORNEYS FOR DEFENDANT,
ASSOCIATED MILK PRODUCERS, INC.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUAN J. RINCONES and LYNDA G. RINCONES, Individually and Next Friends of MARK ANTHONY RINCONES, JOSE RINCONES and MONICA RINCONES, minors MARICELDA RINCONES; and JOSE RINCONES, JR.,	)	
Plaintiffs,	)	
v.	)	Case No. 91 C 565 B
ROGER COOPER, Individually and doing business as ROGER COOPER, INC.; ROBERT LEWIS SHORT, JR.; SHIELD OF SHELTER INSURANCE COMPANY; P.C. SERVICES, INC.; OFELIO PEREZ; ZENITH ELECTRONICS CORPORATION; ZENITH ELECTRONICS CORPORATION OF TEXAS; and RYDER TRUCK RENTAL, INC.,	)	
Defendants.	)	

ORDER OF DISMISSAL

Pursuant to the Stipulation for Dismissal on file herein, it is hereby ordered,adjudged and decreed that the above captioned cause is dismissed as to Defendants P. C. Services, Inc., Ofelio Perez, Zenith Electronics Corporation, Zenith Electronics Corporation of Texas and Ryder Truck Rental, Inc.

UNITED STATES DISTRICT JUDGE

10/10/91

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